Supreme Court, U. S.
FILED
MAR 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1043

MILTON W. GARNATZ,
Plaintiff-Respondent,

v.

STIFEL NICOLAUS & CO., INC. and
KINGSLEY O. WRIGHT,
Defendants-Petitioners.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

NEWMAN & BRONSON
MARK I. BRONSON
1015 Locust Street, Suite 728
St. Louis, Missouri 63101
Attorneys for Respondent Milton W. Garnatz

SAMUEL J. GOLDENHERSH
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulations Involved	2
Statement of the Case	2
Argument	5
I. The Decision Below Correctly Applied a Recissory Measure of Damages and There Is No Conflict With Other Circuits	5
II. The Damages Were Properly Measured as of the Date Garnatz Discovered or Should Have Discovered the Petitioners' Fraud	6
III. The Court of Appeals Correctly Declined to Decide Whether the Missouri Blue-Sky Law or Common Law Fraud Statute of Limitations Was Applicable Where the Issue Was Moot	7
Conclusion	8

Table of Authorities

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S. Ct. 1917 (1975)	6
Comstock v. Group of Institutional Investors, 335 U.S. 837 (1948)	6

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 210 n. 29 (1976) 7

In Re Alodex Corporation Securities Litigation, 533 F. 2d 372 (8th Cir. 1976) 7

Musser v. Bach & Co., Inc., C.C.H. Fed. Sec. Rptr. ¶ 96,183 (N.D. Calif. 1977) 6

Nickels v. Koehler Management Corp., 541 F. 2d 611 (6th Cir. 1976) 7

Supt. of Insurance v. Bankers L & C Co., 404 U.S. 6, 10 n. 7 5

Vanderboom v. Sexton, 422 F. 2d 1233, 1237 (8th Cir. 1970), cert. denied 400 U.S. 852 (1970) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1043

MILTON W. GARNATZ,
Plaintiff-Respondent,

v.

STIFEL NICOLAUS & CO., INC. and
KINGSLEY O. WRIGHT,
Defendants-Petitioners.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Was a rescissory measure of damages appropriate in a §10b and Rule 10b-5 action where Respondent Milton Garnatz was caused to purchase bonds on margin as a result of Petitioners' fraudulent representations of the bonds and their purchase on margin.
2. Were the damages properly measured as of the date Garnatz discovered or should have discovered the Petitioners' fraud.
3. Did the Court of Appeals for the Eighth Circuit correctly decline to decide whether the Missouri blue-sky or the Missouri common-law fraud statute of limitations was applicable where the issue was moot.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

In November 1972 Respondent Milton Garnatz attended a series of investment seminars sponsored by the Petitioners for the purpose of acquiring customers. After attending several seminars at a local restaurant, Garnatz and others in attendance were invited to the final seminar session which was a personal meeting with Petitioner Wright, Vice President of Petitioner Stifel, Nicolaus & Company, Inc., at Wright's office where they were taken on a tour and shown the modern equipment and facilities of the Petitioners. In the aura of the impressive surroundings, Garnatz disclosed his financial position to Wright, and thereafter was presented with an investment program allegedly for his needs.

At the time of these seminars, Garnatz was retired, had never been married, had no experience with any kind of bonds other than United States savings bonds and had never traded in margin or even heard of a bond margin account. The only experience Garnatz had with securities were occasional purchases over the years of high quality stocks which he held on to for long-term investment purposes.

After attending the seminars and having personal meetings with Wright, Garnatz was induced to permit Petitioners to sell most of his stocks and to purchase securities in a special bond margin account. The bonds purchased purportedly were designed to maximize his income while preserving his capital which goal was his express injunction to Petitioners. The fraudulent representations relied upon by Garnatz were as follows: that the securities purchased would be approved by the Board of Directors of Stifel, Nicolaus & Company, Inc.; that there was a minimal or no possibility of diminution of capital by the utilization of the margin account; that the purchases and margin transactions were without risk and the securities purchased would not go down less than one percent (1%) and were of a quality so as to be completely without risk; that the interest rate on the margin transaction would never be in excess of eight percent (8%); and that Respondent would be in a completely risk free situation as he expected and intended and that Petitioners' recommended purchases would accomplish such a purpose.

The foregoing representations were the fraudulent statements and representations which were set forth in Respondent's verdict directing instruction. At no time have Petitioners either attacked the instruction or the sufficiency of the evidence in support thereof.

Of the bonds purchased to Garnatz's account, at least One Hundred Forty-Seven Thousand Dollars ($147,000.00) par value bonds were rated triple C or had no rating by Standard

& Poor. Such bonds are defined as "outright speculation". In each purchase the Petitioners acted as principals, without disclosing this position to Garnatz, and took sizeable commissions from their markups of the prices which in some purchases amounted to ten percent (10%) of the cash investment.

Whenever Garnatz had an inquiry about the account, he went to the man and company he trusted, the Petitioners. Wright, being a Vice President of the esteemed Stifel, Nicolaus & Co., Inc. which touted itself as having two hundred years of experience, repeatedly and convincingly reassured Garnatz. Garnatz continuously relied upon the Petitioners, their representations, their good name and their two hundred years of experience, all to his damage and their enrichment.

At the trial Petitioners presented evidence and argued to the jury that as of May 1973 Garnatz should have discovered the Petitioners fraud. Garnatz testified that he never understood the margin account and relied upon Wright's continuous reassurances of the aforestated representations. In the latter part of 1973 securities were sold by Wright for a loss of approximately $22,000.00 at which time Wright purchased more of the same and similar bonds to the margin account with Garnatz still relying upon and not comprehending or in any respect knowing the falsity of the aforestated representations. In August of 1974 Garnatz acknowledged that he should have discovered the fraud. As of August 1974 the value of the bonds in his account had dropped nearly Seventeen Thousand Dollars ($17,000.00), and the commissions on the various transactions amounted to more than Six Thousand Dollars ($6,000.00).

The jury awarded Plaintiff damages in the amount of Forty-Five Thousand Dollars ($45,000.00) and the Court of Appeals for the Eighth Circuit held that the damages were proper and supported by the evidence.

ARGUMENT

I

The Decision Below Correctly Applied a Rescissory Measure of Damages and There Is No Conflict With Other Circuits.

Throughout their Petition Petitioners disregard several significant facts. First, contrary to Petitioners' assertions, Garnatz was not an "alleged" defrauded purchaser and this case does not involve "alleged" misrepresentations. The jury finding that Garnatz was defrauded by the representations has never been attacked or appealed by Petitioners. Also, statements in the Petition to the effect that Garnatz knew of the fraud as of May 1973 are without merit and contrary to the findings below.

Second, the facts of this case are to be distinguished from the "garden type variety of fraud".[1] As the Court of Appeals stated, "the gravamen" of Garnatz's action is not the price paid for the bonds but that he purchased them as the result of Petitioners' fraudulent inducements and representations. (App. B of Petition, A-6).

The Court of Appeals thoroughly explained and briefed the reasons for applying the rescissory measure of damages to the facts of this case in part II of its Opinion. (App. B of Petition, pp. A-4 to A-8). Accordingly, Respondent will rely upon the Court of Appeals' Opinion on this issue.

The measure of damages as applied to the facts of this case is not in conflict with other circuits on this matter or of such importance or novelty to warrant this Court to grant certiorari. See note 1 of the Court of Appeals decision below. (App. B of Petition, p. A-7).

---

[1] See *Supt. of Insurance v. Bankers L. & C. Co.*, 404 U.S. 6, 10 n. 7.

II

The Damages Were Properly Measured as of the Date Garnatz Discovered or Should Have Discovered the Petitioners' Fraud.

The Petitioners repeatedly seek to have this Court believe that Garnatz knew the falsity of the representations by May of 1973, and that damages suffered thereafter resulted from inducements to retain the securities. In truth, Garnatz did not have either actual or constructive knowledge of the Petitioners' fraud until August of 1974 as Garnatz so testified, as the jury so found, and as the Court of Appeals so held to be supported by the evidence and reasonable.

Petitioners' attempt to create a similarity between this case, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917 (1975) and *Musser v. Bach & Co., Inc.*, C.C.H. Fed. Sec. Rptr. ¶ 96,183 (N.D. Calif. 1977) where none exists. In neither *Blue Chip Stamps* nor *Musser* was there a purchase or sale of securities causing the Plaintiff's damage. In contrast, Garnatz did purchase securities to his damage as the result of Petitioners' fraudulent misrepresentations and inducements, all of which were continuing in perpetration of the fraud. As the Court of Appeals so succinctly stated, "Defendants should not complain that their fraud was so successful". (App. B of Petition, p. A-9).

This Court should not grant certiorari to review Petitioners' arguments of the evidence and the facts which are contrary to the findings of the jury and the Court of Appeals. *Comstock v. Group of Institutional Investors*, 335 U.S. 837 (1948). Further, the Court of Appeals' decision was not in conflict with any decision of this Court.

III

The Court of Appeals Correctly Declined to Decide Whether the Missouri Blue-Sky Law or Common Law Fraud Statute of Limitations Was Applicable Where the Issue Was Moot.

In Part IV of its Opinion, the Court of Appeals sufficiently stated its reasons for not determining whether the Missouri blue-sky or the Missouri common law fraud statute of limitations applies in post-Ernst § 10(b) and Rule 10b-5 actions. (App. B of Petition, pp. A-11 to A-12). Since Garnatz's suit was held to have been timely filed under either limitations period, the issue was moot.

There is no conflict among the Circuits on this issue since the statute of limitations of the respective forum state is to be followed. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. 29 (1976); *Vanderboom v. Sexton*, 422 F. 2d 1233, 1237 (8th Cir. 1970), cert. denied 400 U.S. 852 (1970); *In Re Alodex Corporation Securities Litigation*, 533 F. 2d 372 (8th Cir. 1976); *Nickels v. Koehler Management Corp.*, 541 F. 2d 611 (6th Cir. 1976).

CONCLUSION

In conclusion, this case has been correctly decided by the District Court and the Court of Appeals and no amount of semantics and misstatements of fact can convert this case into one warranting review by this Court on certiorari.

For the foregoing reasons, it is respectfully submitted that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

NEWMAN & BRONSON

MARK I. BRONSON
1015 Locust Street, Suite 728
St. Louis, Missouri 63101
(314) 231-4800
Attorneys for Respondent

Milton W. Garnatz

SAMUEL J. GOLDENHERSH
Of Counsel